IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

TORREON GOLF CLUB, Petitioner Employer, AMERICAN HOME ASSURANCE COMPANY, Petitioner Insurer, v. THE INDUSTRIAL COMMISSION OF ARIZONA, Respondent, SUSAN BREMER, as guardian ad litem for JORDAN BREMER, JULIEN BREMER, and TYLER BREMER, children of BARRY K. BREMER (Deceased); Respondent Employee.	2 CA-IC 2006-0016 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

SPECIAL ACTION - INDUSTRIAL COMMISSION

ICA Claim No. 20050-060318

Insurer No. YCS 42366

Deborah Nye, Administrative Law Judge

AWARD AFFIRMED

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P E L A N D E R, Chief Judge.

¶1 In this statutory special action, petitioners, Torreon Golf Club and its insurance carrier, American Home Assurance Company, challenge the decision of the administrative law judge (ALJ) finding the death of respondent employee Barry Bremer compensable. Petitioners contend the ALJ erred in concluding that Bremer's death arose out of and in the course of his employment and in failing to consider their public policy arguments. Finding no reversible error, we affirm the ALJ's award.

BACKGROUND

¶2 We view the evidence in the light most favorable to sustaining the ALJ's findings and award. *Rent A Center v. Indus. Comm'n*, 191 Ariz. 406, ¶ 1, 956 P.2d 533,

534 (App. 1998). Bremer was employed as general manager of Torreon Golf Club near Show Low. His duties in that position included, inter alia, overseeing "all operations within the club" and maintaining "member satisfaction." Additionally, Bremer "had the final say on the types of wines that would be held in . . . inventory at the club" and the "ultimate say" on negotiating "the prices and the quantities of the wines from the various liquor distributors" that supplied liquor to the club. In managing the wine selection, Bremer "periodically [attended] wine tasting events."

¶3 On March 10, 2004, Bremer and his assistant manager, Christopher Renowden, attended a wine-tasting event at the Sunrise Ski Resort hosted by Alliance Beverage, which had "tack[ed] on [the] additional incentive[]" of skiing to encourage clients to attend. The ski resort is approximately fifty miles from the Torreon office. Bremer and Renowden drove separately to the resort and were "paid mileage for th[e] trip."

¶4 After skiing in the morning with the Alliance wine broker, Amy Widmaire, Bremer met Renowden, who did not ski, at approximately 12:00 noon at the bottom of the slopes. Widmaire testified that Bremer had not had difficulty skiing that morning and had not appeared to be under the influence of alcohol. Renowden similarly testified that Bremer had not exhibited signs of intoxication at that point. After a short visit with Renowden, Bremer decided "to take one more lift up" before the wine-tasting event. Renowden next saw Bremer approximately an hour later, and while the two men waited for the event to begin, Bremer had one beer.

¶5 The wine-tasting event started at approximately 2:30 p.m. The event included descriptions and corresponding tastings of about twelve wines. A tasting was "close[] to [an] ounce," and Renowden testified that Bremer probably had "consumed 10 out of the 12 that were served." Renowden also testified that hors d'oeuvres had been provided at the event and that Bremer had been "eating all the way through" the actual wine tasting.

¶6 At approximately 3:30 p.m., at the conclusion of the event, Bremer joined Widmaire and the wine specialist "to go skiing." Widmaire testified that during the afternoon run Bremer had not appeared "to be under the influence in any way." Later, at approximately 4:15 p.m. and after Bremer had packed his ski gear in his vehicle, Bremer and Renowden met at the resort's lodge. The two men each consumed one alcoholic drink and one "shot." After between fifteen to thirty minutes, Bremer and Renowden left the lounge and walked "down a set of stairs through the snow" to their vehicles. The men had plans to meet Widmaire and the wine specialist in Pinetop for dinner at 6:30 p.m. Renowden testified there was no "indication during that period of time that [Bremer had been] having any difficulty negotiating walking on the snow."

¶7 At 4:57 p.m., while driving west on State Route 260 toward Pinetop, Bremer died when he lost control of his vehicle, was ejected from it, and struck a tree. Susan Bremer, Bremer's former wife, filed a claim for workers' compensation death benefits on behalf of herself and as guardian ad litem for Bremer's three minor children. The insurer denied the claim. Susan then timely filed a request for hearing.

¶8 Petitioners' toxicology expert, William Collier, testified that a sample of Bremer's blood taken after the accident showed he had a blood alcohol concentration (BAC) of .377. Collier testified that in order to have that BAC level, Bremer would have had to ingest 21.26 drinks between 1:00 p.m., when he had his first drink, and his death approximately four hours later. Notwithstanding that testimony, Bremer was actually witnessed having consumed "six drinks total." Collier estimated that those six drinks in a four-hour time span would have produced a BAC at the time of Bremer's death of .053—which "would give him a presumption of sobriety." Collier further testified that had Bremer consumed only one beer and ten to twelve ounces of wine, his BAC at the time of death would have been .011.

¶9 On cross-examination, Collier conceded there "[c]ould be . . . issue[s]" "with taking a postmortem blood sample," including obtaining an inaccurate BAC if a person's stomach, with alcohol inside it, ruptures and blood is later drawn from an area that was covered by the alcohol. There were also issues raised relating to the chain of custody of the blood sample. Because the ALJ ultimately determined that "the exact source of and accuracy of [Bremer's] blood alcohol level at the time of death" were "immaterial" to her decision, however, those issues were not further explored.

¶10 After the hearing, the ALJ found the death claim compensable, awarded benefits to Bremer's minor children, and denied benefits to Susan, who was divorced from

Bremer at the time of his death. The ALJ affirmed her findings on administrative review, and this petition for special action followed.

DISCUSSION

I. Legal causation

¶11 Petitioners argue the ALJ erred in finding Bremer's death compensable, asserting the accident did not occur in the course or arise out of his employment and his death was not caused by a necessary risk of his employment. Essentially, petitioners maintain respondents failed to establish legal causation, a prerequisite for receiving workers' compensation benefits. *See Grammatico v. Indus. Comm'n*, 211 Ariz. 67, ¶ 19, 117 P.3d 786, 790 (2005) (legal causation contains three elements: (1) "the employee must have been acting in the course of employment"; (2) "the employee must have suffered a personal injury from an accident arising out of and in the course of such employment"; and (3) "the resulting injury must have been caused in whole or in part, or contributed to, by a necessary risk of the employee's employment"); *see also* A.R.S. § 23-1021(A) (for injury to be compensable, it must arise out of and occur in course of one's employment). "[W]e deferentially review an ALJ's factual findings reasonably supported by the record but review the ALJ's legal conclusions de novo." *Hypl v. Indus. Comm'n*, 210 Ariz. 381, ¶ 5, 111 P.3d 423, 425 (App. 2005); *see also* A.R.S. § 23-951(B); *Benafield v. Indus. Comm'n*, 193 Ariz. 531, ¶ 11, 975 P.2d 121, 125 (App. 1998). We address each element of legal causation in turn.

A. Course of employment

¶12 Petitioners first argue the ALJ "erred in finding Bremer's death occurred in the course of his employment." "The 'in the course of' requirement is satisfied if the claimant shows the injury occurred during the time, place, and circumstances of the claimant's employment." *Hypl*, 210 Ariz. 381, ¶ 6, 111 P.3d at 426. In finding that Bremer's death occurred in the course of his employment, the ALJ found, inter alia, that his attendance at the wine-tasting event was within "the scope of his responsibilities" as general manager and that both "the activity of wine-tasting" and "the activity of driving home from a dual purpose trip [were] reasonably expected employment activit[ies]."[1]

¶13 Petitioners do not contend Bremer's accident occurred outside the time and place requirements of his particular duties that day. Rather, they analogize this case to cases in which employees were found to have left the course of their employment by engaging in "horseplay." Petitioners assert that Bremer's alcohol consumption amounted to horseplay.

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[1]As a general rule, one is not in the course of employment when going to and coming from work, but "[a]n exception to this general rule applies if an employer compensates an employee for travel expenses and the totality of circumstances implies that 'the employment can be considered to include travel itself as a substantial part of the service performed.'" *Poole v. Indus. Comm'n*, 174 Ariz. 448, 449, 850 P.2d 686, 687 (App. 1993), *quoting Fisher Contracting Co. v. Indus. Comm'n*, 27 Ariz. App. 397, 399, 555 P.2d 366, 368 (1976). Here, there was testimony that both Bremer and Renowden were paid mileage for going to and coming from the wine-tasting event. Further, petitioners do not argue that Bremer's commute to and from the event was not within the course of his employment.

¶14 In support of this argument, petitioners rely, inter alia, on *Anderson Clayton & Co. v. Industrial Commission*, 125 Ariz. 39, 607 P.2d 22 (App. 1979). There, Division One of this court found that an employee's horseplay had "carr[ied] him beyond the course of his employment." *Id*. at 42, 607 P.2d at 25. The claimant in that case was injured after he jumped seventy feet off a conveyor belt into a pile of cotton seeds located 100 yards from the room in which he had worked. *Id*. at 40-41, 607 P.2d at 23-24. In determining whether the injury occurred within the course of his employment, the court stated "the test to be applied is whether the particular activity which gives rise to the injury was of a nature that the employee might reasonably be expected to be engaged in it at the time, and it occurred at a place the employee might reasonably be expected to be." *Id*. at 41, 607 P.2d at 24. The court also noted that activity that is within the course of one's employment "normally has connotations of benefits flowing to the employer, rather than purely personal benefits flowing to the employee." *Id*. at 41-42, 607 P.2d at 24-25.

¶15 Here, the ALJ found that Bremer's drive home from the wine-tasting event was "reasonably expected employment activity, in sharp contrast to jumping from a conveyor belt into a pile of seed." That distinction is valid, and we have no basis for disturbing the ALJ's ruling that Bremer's actions did not amount to horseplay. It was expected that Bremer would drive home at the end of the day. There is no evidence that Bremer deviated from the normal route in an effort to show off for coworkers or to pursue a purely personal benefit. *See Anderson Clayton*, 125 Ariz. at 41-42, 607 P.2d at 24-25. Instead, there was

testimony that Bremer's attendance at the event benefited his employer by "providing a product to [Torreon's] members that would increase sales and overall profit of the club." Therefore, the ALJ reasonably could find that Bremer's commute to and from the event was beneficial to the club and was within the course of his employment.

¶16 Although petitioners apparently concede that Bremer's death occurred during an activity and in a place that could be considered part of his job, they insist he "voluntarily altered" the risks of his job by "driving with a BAC of .377." But analysis of petitioners' horseplay argument centers on whether an employee was engaging in an activity wholly separate from his or her assigned duties—not whether the employee increased the risks of those official duties. *See Mustard v. Indus. Comm'n*, 164 Ariz. 320, 322, 792 P.2d 783, 785 (App. 1990) (analyzing whether employee's running from pursuit of another employee she had teased amounted to "substantial deviation from employment"); *Jaimes v. Indus. Comm'n*, 163 Ariz. 307, 311, 787 P.2d 1103, 1107 (App. 1990) (claimant who sat on dashboard of utility vehicle used on golf course and fell out after tickling driver "did not substantially deviate from the course of his employment and consequently . . . his injury [wa]s compensable even though the result of horseplay").[2] And Bremer's return drive was

[2]Petitioners repeatedly insist that "driving with a BAC of .377" amounts to horseplay. Yet, as explained above, whether Bremer increased the risks of his work duties has no bearing on whether he was engaging in horseplay—a deviation from his work duties. We note that an employee's intoxication at the time of an injury can lead to a finding that the employee abandoned his or her duties and thereby acted outside the course of employment. *See Producers Cotton Oil v. Indus. Comm'n*, 171 Ariz. 24, 25, 827 P.2d 485, 486 (App. 1992). If petitioners are essentially equating horseplay with abandonment, we address the latter issue below.

not a substantial deviation from his official duties. Accordingly, the ALJ did not err in finding that Bremer was not engaged in horseplay at the time of the accident and, therefore, that the accident occurred in the course of his employment.[3]

B. Abandonment

¶17 In a related argument, petitioners contend the ALJ "erred in finding Bremer did not abandon his employment" through intoxication. They assert Bremer "was incapable of properly driving" because of his BAC level. But, in *Embree v. Industrial Commission*, 21 Ariz. App. 411, 413, 520 P.2d 324, 326 (1974), on which petitioners rely, Division One of this court rejected "incapable of properly performing" as the correct test for determining whether an employee has abandoned his or her employment.

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[3]In finding that Bremer's attendance at the wine-tasting event was within his responsibilities as manager of Torreon Golf Club, the ALJ also determined that because Bremer had a personal interest in skiing, his trip served a "dual purpose." As the ALJ noted: "An injury or death occurring during a dual purpose trip is within the course of employment if the necessity for the travel was work-related, and if the journey would have been made had the private mission been canceled." *See Greenlaw Jewelers v. Indus. Comm'n*, 127 Ariz. 362, 364, 621 P.2d 49, 51 (App. 1980). Here, the ALJ concluded that Bremer would have attended the event, "even if the skiing had been cancelled," based on the facts that Bremer had "instructed his assistant manager to meet him for the wine-tasting event" even though the assistant manager did not ski and that Bremer "had . . . attended other such events . . . not involving skiing." In a somewhat confusing argument, petitioners now assert "[t]he dual purpose doctrine is inapplicable here because the risk of driving with a BAC of .377 is vastly different than the risk of driving with a BAC of .011." Petitioners, however, do not assert that Bremer's attendance at the event was solely a private mission and, similarly, do not clearly argue that the trip was not made for a dual purpose. Rather, they apparently argue that the fact that it was a dual purpose trip does not justify his actions. But petitioners do not cite, nor have we found, authority for the proposition that a dual purpose trip is negated when the employee increases the risk of his or her duties.

¶18 Rather, "[i]ntoxication precludes an award of benefits only when an employee drinks to such an extent that he can no longer perform the duties of his employment, so that he can be said to have abandoned his employment." *Producers Cotton Oil v. Indus. Comm'n*, 171 Ariz. 24, 25, 827 P.2d 485, 486 (App. 1992); *see also Embree*, 21 Ariz. App. at 413, 520 P.2d at 326 (recovery barred when intoxication reaches point that employee can no longer follow his or her employment). "The issue as to when intoxication is so great as to constitute an abandonment of employment must be determined from the facts of each case." *Producers Cotton Oil*, 171 Ariz. at 25, 827 P.2d at 486. In reviewing the facts, we do "not substitute our judgment for that of the ALJ but review the evidence to determine if there is a reasonable basis for [her] decision." *Id.* at 25-26, 827 P.2d at 486-87.

¶19 In finding that Bremer had not abandoned his duties, the ALJ stated:

> In this case, based solely on decedent's blood alcohol level, [petitioners] contend decedent should [have] been closer to the "drunken stupor" end of th[e] road because Mr. Collier testified that decedent would be expected to be demonstratively confused and stuporous at this level, exhibiting numerous other behaviors at the upper end of the inebriation scale. The problem with this testimony, which I find credible for its theoretical application, is that in this case credible testimony of actual witnesses reveals nothing of the sort. Neither Mr. Renowden nor Ms. Widmaier described a man in or even near a drunken stupor. He wasn't stumbling, he wasn't slurring his speech, and he had been demonstratively in charge of his motor skills, skiing without incident only forty-five minutes before his accident, walking down snowy stairs and crossing a snow covered parking [lot] without signs of intoxication while being observed by someone who had in fact seen him drunk on other occasions, but saw no evidence of it on this occasion. He had been engaging in focused conversation, registering normal

> emotions, and he had been capable of entering his car, removing it from the parking lot without incident and proceeding down the road toward Pinetop.

The ALJ concluded: "Assuming the accuracy of the [BAC] test results, I still find, based on the witnesses' accounts, that the decedent was able to follow his employment and was doing so at the time he was killed. I do not find abandonment."

¶20 The record supports the ALJ's conclusion. As mentioned, the ALJ accepted as credible testimony that Bremer had not appeared or behaved as if he was intoxicated, had been capable of skiing without incident, had conversed normally without obvious signs of intoxication, and shortly before the accident had walked down stairs and through snow with no signs of inebriation. In view of the evidence that Bremer was able to function in those capacities, and giving due deference to the ALJ's findings, we cannot say she erred in rejecting petitioners' assertion that Bremer was unable to perform the duties of his employment. *See Producers Cotton Oil*, 171 Ariz. at 25-26, 827 P.2d at 486-87. Accordingly, the ALJ did not err in finding that Bremer had not abandoned his employment.

C. Arising out of employment

¶21 Petitioners also argue the ALJ "erred in finding Bremer's death arose out of his employment." It is well established that "[t]he 'arising out of' requirement refers to the origin or cause of the injury and is met when the claimant shows a causal relationship between the employment and the injury." *Hypl*, 210 Ariz. 381, ¶ 6, 111 P.3d at 425-26; *see*

also Murphy v. Indus. Comm'n, 160 Ariz. 482, 485, 774 P.2d 221, 224 (1989); *Peetz v. Indus. Comm'n*, 124 Ariz. 324, 326, 604 P.2d 255, 257 (1979) ("[I]n order to establish the requisite causal relationship, the injury need merely result from some risk inherent in or incidental to the claimant's employment."); *Bergmann Precision, Inc. v. Indus. Comm'n*, 199 Ariz. 164, ¶ 9, 15 P.3d 276, 278 (App. 2000) (same).

¶22 The ALJ found that, "regardless of whether [Bremer] was intoxicated, and regardless of the percent of blood alcohol in his system, he died in an accident driving home from a dual purpose trip. To the extent that driving was a risk . . . [of] his employment, I conclude his death arose out of his employment." Citing *Grammatico v. Industrial Commission*, 211 Ariz. 67, 117 P.3d 786 (2005), the ALJ noted that, although driving under the influence of alcohol was "undoubtedly dangerous and foolhardy," such facts related "only . . . to decedent's negligence, which [could] not be a factor in [her] analysis." The ALJ did not err in so ruling.

¶23 In *Grammatico*, our supreme court determined that the legislature could not impermissibly restrict legal causation, which is constitutionally defined. *Id.* ¶¶ 34-35. Article XVIII, § 8 of the Arizona Constitution provides in part:

> The Legislature shall enact a Workmen's Compensation Law . . . by which compensation shall be required to be paid to any such workman, in case of . . . injury . . . if in the course of such employment personal injury to . . . any such workman from any accident arising out of and in the course of, such employment, is caused in whole, or in part, or is contributed to, by a necessary risk or danger of such employment, or a necessary risk or danger inherent in the nature thereof . . . .

The court in *Grammatico* found unconstitutional, as applied to the two cases before it, legislation that "requir[ed] proof that the presence of alcohol or illegal drugs in an injured worker's system was not a contributing cause of the accident before workers' compensation benefits may be awarded." 211 Ariz. 67, ¶¶ 1, 35, 117 P.3d at 787, 794. Based on the constitutional mandate for compensation if a necessary risk or danger of employment partially caused or contributed to an accident, the court found that only "[i]ntentionally self-inflicted injuries . . . bar compensation." *Id.* ¶ 29. And, although the court acknowledged that "alcohol consumption and illegal drug use shortly before work or during work undeniably increase the chances of being injured on the job," it further stated, "it cannot be unequivocally said that employees with alcohol or drugs in their systems who sustain injuries have *intentionally* injured themselves." *Id.* ¶ 33.

¶24 Petitioners argue that, "[w]hile Bremer may have had the very small risk of being involved in a motor vehicle accident driving to or from the wine tasting, that risk did not include the risk of driving with a BAC of .377." And, they further argue, "drinking to the point of reaching a BAC of .377 was [not] a risk inherent in Bremer's employment." But, whether Bremer increased the risks of driving by doing so while under the influence of alcohol does not affect our analysis. *See id.* ¶ 29 ("[A]n employee who violate[s] criminal laws and [i]s injured in the process [i]s not barred from workers' compensation because such a violation merely establishe[s] contributory negligence, which does not bar recovery under the workers' compensation scheme.").

¶25 Rather, we must determine whether driving—a necessary risk or danger of his employment—partially caused or contributed to the accident. The ALJ did not err in concluding that it did. Under *Grammatico*, and based on the record before us, a finding of noncompensability would be warranted only if the necessary risks or dangers of Bremer's job had no causal relationship to his death or if he purposefully caused his own death. *See id*. ¶¶ 26, 28. The record does not support either scenario. Driving always involves a risk of possible accidents. And, although the road conditions were not treacherous or particularly dangerous, Arizona law permits compensation when an employee's own negligence contributed to an accident under otherwise benign conditions. *See id.* ¶ 29 ("[C]ontributory negligence . . . does not bar recovery under the workers' compensation scheme."). Further, we cannot say, nor have petitioners argued, that Bremer intentionally caused the accident. Accordingly, because a risk of Bremer's employment caused or contributed to his death, the ALJ did not err in concluding that Bremer's death arose out of his employment.

D. Necessary risk

¶26 Despite *Grammatico*, petitioners argue the ALJ "erred in finding a necessary risk of Bremer's employment (driving) caused Bremer's death where the uncontroverted evidence supported the conclusion that there would not have been any accident but for Bremer's voluntary and excessive consumption of alcohol." But, again, under *Grammatico*, an employee need not prove that a necessary risk was the sole cause of the injury. Rather,

an employee must show that "the resulting injury [was] caused in whole or in part, *or contributed to*, by a necessary risk of the employee's employment." *Id.* ¶ 19 (emphasis added).

¶27 Petitioners failed to establish that driving did not contribute to Bremer's death. Nor could they have done so when, as the ALJ noted, it was undisputed "that [Bremer's] death was caused by the [automobile] accident." It is certainly possible, if not probable, that alcohol consumption increased Bremer's chance of having an accident. But the same can be said for the workers in *Grammatico*—one of whom had marijuana and methamphetamine in his system when he fell off forty-two-inch drywall stilts and the other who had alcohol in his system when he was injured while trying to fix a "bogged down" conveyor belt. *Id.* ¶¶ 3, 5.

¶28 Simply put, under *Grammatico*, because driving was a necessary risk that contributed to Bremer's accident, his death is compensable even accepting petitioners' premise that the accident would not have occurred but for Bremer's intoxication. As explained above, *Grammatico* recognized that "alcohol consumption and illegal drug use shortly before work or during work undeniably increase the chances of being injured on the job," but also noted that "contributory negligence . . . does not bar recovery under the workers' compensation scheme." *Id.* ¶¶ 33, 29. Accordingly, the ALJ did not err in finding Bremer's death compensable.

II. Public policy

¶29 Lastly, petitioners argue the ALJ "erred in rejecting public policy arguments that worker[s'] compensation insurance should not provide benefits to employees or their dependents where the death (or injury) was caused by a risk voluntarily created by the employee." But, like this court, the ALJ is bound by the reasoning of our supreme court. *See State v. Sullivan*, 205 Ariz. 285, ¶ 15, 69 P.3d 1006, 1009 (App. 2003) ("[W]e are constrained by the decisions of our supreme court and are not permitted 'to overrule, modify, or disregard them.'"), *quoting City of Phoenix v. Leroy's Liquors*, 177 Ariz. 375, 378, 868 P.2d 958, 961 (App. 1993). And, although the supreme court in *Grammatico* recognized "th[e] compelling policy reasons" to ban alcohol and drug use in the workplace, it also stated that "'unless and until the constitution is changed, the legislature cannot abrogate claims for workers' compensation for injuries wholly or partially caused or contributed to by necessary employment risks.'" 211 Ariz. 67, ¶ 34, 117 P.3d at 793-94, *quoting Grammatico v. Indus. Comm'n*, 208 Ariz. 10, ¶ 18, 90 P.3d 211, 216 (App. 2004). Thus, the ALJ did not err in rejecting petitioners' public policy arguments as a basis for finding the claim noncompensable.

DISPOSITION

¶30 The ALJ's award is affirmed.

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JOHN PELANDER, Chief Judge

CONCURRING:

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JOSEPH W. HOWARD, Presiding Judge

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GARYE L. VÁSQUEZ, Judge